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The Court of Justice and European Criminal Law

Leading Cases in a Contextual Analysis

Edited by
Valsamis Mitsilegas
Alberto di Martino
and
Leandro Mancano

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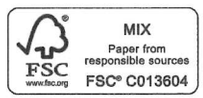

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FOREWORD

If there is one area of law that has been associated with national sovereignty, that is without a doubt criminal law. Traditionally, criminal law has been considered to be one of the 'crown jewels' of national sovereignty. That is because criminal law establishes the rules that enable the state to defend itself and its citizens against actions that are repugnant to the values on which democratic societies are founded. Criminal law is thus a powerful tool that gives true meaning to the idea that only the state may lawfully deprive a person of his or her liberty.

That is why, without a clear mandate from the EC Treaty itself, Member States were initially hostile to the very idea that the EU (then the Community) could enjoy the legislative power to adopt criminal penalties as a means of enforcing substantive EU policies,[1] let alone to harmonise substantive criminal law.

That did not mean, however, that criminal law 'constitute[d] an island beyond the reach of [EU] law'.[2] As some scholars noted, '[n]ational criminal [law] [has always been] restricted either "passively" [by the substantive law of the EU] or "actively" through the imposition of specific criminal sanctions deemed necessary to ensure the proper implementation of [EU law]'.[3] Passively, whilst criminal law was seen as a matter for which the Member States were responsible, that branch of the law was circumscribed by the fundamental freedoms where it constituted an obstacle to free movement. Actively, since the Member States are obliged to penalise infringements of EU law in an effective, proportionate and dissuasive fashion, such an obligation may sometimes require the adoption of criminal penalties.

That said, over the past 60 years, the EU has changed. Its remit is no longer confined to imposing 'active' and 'passive' limits to the criminal laws of the Member States, but has evolved with successive Treaty reforms to cover substantive and procedural aspects of those laws.

[1] See Michael Dougan, 'From the Velvet Glove to the Iron Fist: Sanctions and Penalties for the Enforcement of Community Law' in Marise Cremona (ed), *Compliance and Enforcement of EU Law* (Oxford University Press, 2012) 90.

[2] See, by analogy, Opinion of Advocate General Tesauro in Case C-120/95 *Decker* EU:C:1997:399, para 17. See also Koen Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2009–10) 39 *Fordham International Law Journal* 1338.

[3] Andrea Biondi and Roberto Mastroianni, Case Note on *Berlusconi e.a* (2006) 43 *CML Rev* 553, at 559.

usually free to decide through which area of law they wanted to enact those prohibitions. And where Member States failed to (correctly) transpose EU-level prohibitions, courts could be held to give effect to those norms nevertheless, ie through the method of directive-conform interpretation.

Because at earlier times EU law mostly concerned maximum obligations, the boundaries to the duty of consistent interpretation were relatively clear, especially in the criminal law domain. In the *Kolpinghuis* judgment, the principles of legal certainty and non-retroactivity have been held to limit the national court's duty to interpret national law in conformity with higher ranking EU norms – namely where such an interpretation would have the effect of determining or aggravating criminal liability.

Now the inconsistencies that follow from the previous account already disclose the difficulties and obscurities judges may encounter in applying the method of directive-conform interpretation in practice. But as claimed in this commentary, the rise of EU minimum norms in the field of substantive criminal law has complicated the application of directive-conform interpretation even more. Where the national legislator has decided to go beyond what is minimally required and to broaden the scope of the EU-level criminal prohibition, the question arises whether and to what extent courts can still be bound to interpret national implementation legislation in conformity with the relevant EU norms. As argued above, it may well be that the frequent lack of references to EU law in Dutch criminal courts in cases on human trafficking and money laundering does relate to the very fact that in these areas of crime national legal provisions have transposed *minimum norms* in EU directives. Would that be the case indeed it suggests that, in addition to existing limitations, the duty of consistent interpretation is further restricted in cases where EU norms constitute minimum norms, as to which the national legislature has decided to go beyond what is at least required.

2

C-387/02 – *Berlusconi and Others*

The Berlusconi *Judgment: A Cornerstone of European Legality*

FRANK MEYER

I. Introduction

The *Berlusconi* judgment is commonly portrayed as a landmark case of European legality. It has firmly established the *lex mitior* principle in EU criminal law. The Court of Justice of the European Union (CJEU) held that 'the retroactive application of the more lenient penalty that came into effect ex post facto was part of the common constitutional heritage of the Member States', from which it 'follows that this principle must be regarded as forming part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law'.[1] To date, this judgment ranks as main precedent in this regard. The *Berlusconi* judgment is also frequently referenced as a leading case regarding the direct effect of directives in the field of criminal law. It is often cited alongside the *Kolpinghuis Nijmegen* ruling of the CJEU from 18 years earlier. In the *Kolpinghuis* case the CJEU developed its jurisprudence on the direct application of directives in the field of criminal law. The Court held that a

> national authority may not rely, as against an individual upon a provision of a directive whose necessary implementation in national law has not yet taken place. … [A] directive cannot, of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.[2]

This chapter has a twofold mission. It will sketch a brief historiography of the *Berlusconi* case and its quintessential propositions. From here the text will proceed

[1] Joined Cases C-387/02, C-391/02, C-403/02 *Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and others* [2005] ECR I-03565.

[2] Case C-80/86 *Kolpinghuis Nijmegen BV* [1987] ECR 3969.

to take a look at its reception in legal practice and academia. It will be scrutinised whether the widespread understanding of the case is actually accurate. Taking a closer look at the case and its premises might reveal that the conclusions drawn by the Court were much less obvious than one would infer from its (attributed) status as major precedent. It could turn out that this perception is, at least partly, misplaced. Finally, the CJEU's main arguments will be put to the test in the new constitutional environment of the area of freedom, security and justice. It is argued that the legality principle in the Charter of Fundamental Rights (CFR) lends much less support to the CJEU's position in *Berlusconi* than one would expect.

The analysis in this chapter proceeds in four steps. The first section summarises the facts of the case. The second section repeats the main arguments of the Court. The standing and interpretation of the decision in national courts and by criminal lawyers will be traced in the third section. The fourth and major section is dedicated to a deeper exploration of the judgment. Source and justification of the *lex mitior* principle will be illuminated and placed within the context of EU (criminal) law. The chapter then concludes with several suggestions on how the *lex mitior* principle and the supremacy of EU law should be reconfigured within the framework of a multilevel area of freedom, security and justice.

II. The Facts

The case originated in criminal proceedings which had been brought against the former Italian Prime Minister, Silvio Berlusconi, and others for alleged breaches of the provisions governing false information on companies (false accounting) between 1986 and 1989, punishable under Articles 2621 and 2622 of the Italian Civil Code. He was accused of drawing up and publishing false documents relating to the annual accounts of companies in the Fininvest group in responsible capacity in order to increase hidden reserves earmarked for the financing of certain allegedly unlawful transactions.[3] The substantive accounting and reporting requirements, as well as sanctions in the pertinent provisions of the Italian Civil Code both sought to implement EU law, namely, the First, Fourth and Seventh Company Law Directives.[4] After commencement of the proceedings, Italian law-makers passed Legislative Decree No 61/2002 introducing the new Articles 2621 and 2622 in the Italian Civil Code. With the Decree's entry into force on 16 April 2002 they replaced the corresponding old provisions. The new provisions provided for considerably higher liability thresholds ('margins of tolerance'), lower sentences (which led to a shorter limitation period) and new prosecution requirements (precondition of individual complaint in Article 2622). The national courts rightly concluded that the effect of applying those new provisions rather

[3] *Berlusconi et al* (n 1) para 27.
[4] See nn 5, 6 and 7.

than those applicable at the material time would be that criminal prosecution of the accused would no longer be possible. The charges would be time-barred or lack a complaint from a member or a creditor who regarded himself as having been adversely affected by the false documentation. The accused parties argued that the new provisions ought to be applied to them. Article 2 paragraph 4 of the Italian Criminal Code stated that

> if the legislation in force when the offence was committed and the later legislation differ, the legislation which is to apply shall be that which is more favourable in its provisions to the accused person, unless a final and irreversible judgment has been delivered in the case.

The Italian courts sensed the tensions between the said statutory demand and their legal obligations under the then EC law, specifically:

- First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (the First Company Law Directive),[5] in particular Article 6 thereof;
- Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (the Fourth Company Law Directive),[6] in particular Article 2 thereof; and
- Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (the Seventh Company Law Directive),[7] in particular Article 16 thereof.

The Italian judiciary referred the case to the CJEU. In particular, they inquired whether Article 6 of Directive 68/151/EEC (directly or in conjunction with Article 5 EEC, which later became Article 10 TEC) required the Italian legislature to criminalise the alleged conduct and whether they were supposed to disapply the new provisions if they could not be considered adequate in this regard.[8]

The Commission argued that the incompatibility of later adopted, more lenient national provisions with Community law could indeed force national courts to set

[5] Directive 68/151/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community [1968] OJ L65/8, 41.
[6] Directive 78/660/EEC based on Article 54 (3)(g) of the Treaty on the annual accounts of certain types of companies [1978] OJ L222/11.
[7] Directive 83/349/EEC based on Article 54 (3)(g) of the Treaty on consolidated accounts [1983] OJ L193/1.
[8] They sought further advice as to whether the principles on annual and consolidated accounts set out in the Fourth and Seventh Company Law Directives are to be interpreted as precluding national legislation setting thresholds below which inaccurate statements would no longer be punishable.

aside the application of those national provisions in order to maintain the applicability and effects of national implementing legislation in force at the time of commission. In the Commission's view, the primacy of Community law precluded the application of *leges mitior* if the new provisions did not ensure that infringements of Community law were punished in an appropriate manner. Advocate General (AG) Kokott concurred. In her view the referring courts had an obligation under Community law to give effect to the provisions of the Company Law Directives in the criminal proceedings pending before them.[9] AG Kokott emphasised that directives cannot be relied upon directly in order to determine or aggravate liability in criminal law since a directive may not of itself give rise to obligations against individuals.[10] But no such situation was present in the case at hand as the directives in conjunction with Article 10 TEC did not render individuals criminally liable. On the contrary, they ensure that the 'national legislation as it existed at the material time none the less remains applicable'. In the present case, it was not the Community legislation which determined or increased criminal liability. Union law would merely command that the effects of the national legislation in force at the time of the acts and in conformity with Community law be maintained ('by refraining from the application of later legislation which is more favourable but contrary to Community law').

III. The CJEU's Judgment in a Nutshell

The CJEU reviewed the new legislation for its appropriateness under Union law. The Court specified the obligations arising from the First, Fourth and Seventh Company Law Directives in light of its case law on Article 10 TEC.[11] Their enforcement nevertheless ought not to infringe on general principles of Union law. Forming part of the constitutional traditions common to all Member States, the rule of retroactive application of the more lenient penalty also fell into this category.[12] Although the Court raised the obvious question that this principle might be at variance with other central elements of Union law, it concluded straightforwardly that it was not necessary to further address this aspect since the community rule concerned in the case at hand was contained in a directive, an instrument which cannot be relied upon against an individual directly to establish or increase that individual's criminal liability.[13] The CJEU acknowledged that, in theory, national courts would have to set aside new measures which threaten the effectiveness of EU law. In the present setting, however, not applying new,

[9] AG Kokott, *Berlusconi et al* (n 1), Opinion delivered on 14 October 2004, para 136.
[10] AG Kokott, *Berlusconi et al* (n 1), Opinion delivered on 14 October 2004, para 142.
[11] *Berlusconi et al* (n 1) paras 53 ff.
[12] *Berlusconi et al* (n 1) paras 68 ff.
[13] *Berlusconi et al* (n 1) paras 74 ff.

unsatisfactory legislation would be contrary to this tenet of EU law and have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the Company Law Directives.[14]

It was this effect that the CJEU saw looming on the horizon in *Berlusconi*. For the Court to set aside the application of more lenient provisions provided for by the new articles would have been tantamount to rendering applicable a manifestly more severe criminal penalty (and liability requirements) based on a directive.[15]

IV. Reception and Interpretation by National Criminal Courts and Scholars

While many commentators have criticised the erratic approach the CJEU had adopted and the obvious inconsistencies with its prior case law,[16] the decision has been well received by the criminal law community; not least because it curbs the influence of EU law on national criminal justice systems. It confirmed the predominant view that a directive cannot by itself have the effect of determining or increasing the criminal liability of those who act in breach of the directive. The *Berlusconi* judgment seems to extend the said *Kolpinghuis* jurisprudence to the context of legislative changes ex post facto, even though it compromised EU law's primacy and effectiveness. The recognition of the *lex mitior* safeguard has raised more eyebrows. Although the principle is well-known in national systems, it has been argued that it is not one of constitutional law.[17] But overall, the content and foundation of *lex mitior* have not been discussed thoroughly by either CJEU or criminal lawyers.

Further discrepancies have come to the fore in academic comments on the case. Some scholars argue that the case did not involve a primacy problem in the first place. Hecker, for instance, explains that such conflicts could arise where

[14] *Berlusconi et al* (n 1) paras 78 and 74 citing *Kolpinghuis Nijmegen* (n 2) para 13 and Case C-60/02 *X* [2004] ECR I-00651, para 61 and the case law there cited.
[15] *Berlusconi et al* (n 1) paras 75 and 76; confirmed in Joined Cases C-23/03, C-52/03, C-133/03, C-337/03, C-473/03 *Mulliez and Others* [2006] ECR I-03923, para 45.
[16] A Biondi and R Mastroianni, 'Joined Cases C-387/02, C-391/02 and C-403/02, Berlusconi and Others' [2006] *Common Market Law Review* 563; according to E Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford and Portland, Hart Publishing, 2012) 21, the CJEU should have clarified how to resolve confrontations between positive and negative obligations in EU law.
[17] I Gross, 'Keine Strafverfolgung wegen Bilanzfälschung auf Grund einer Richtlinie – Berlusconi' [2005] *Europäische Zeitschrift für Wirtschaftsrecht* 371, 372; H Satzger, 'EuGH, 3.5.2005 – Rs. C-387/02, C-391/02 u. C-403/02 Berlusconi u. a. – Zum Lex-mitior-Grundsatz im Gemeinschaftsrecht' [2005] *Juristenzeitung* 998, 1000. Dannecker, on the other hand, views *lex mitior* as a basic principle of substantive justice, *cf* G Dannecker, 'Der zeitliche Geltungsbereich von Strafgesetzen und der Vorrang des Gemeinschaftsrechts' [2006] *Zeitschrift für internationale Strafrechtsdogmatik* 309, 315.

EU law stipulates directly applicable conflicting rules.[18] Since directives cannot have such (direct) effect they cannot claim priority over national law (so-called *Scheinkollision*).[19] It was considered unpersuasive and arbitrary that AG Kokott relied on the older Italian provisions as anchor points of primacy. These could not be equated with EU law since they were set by the Italian legislature which deliberately opted to change them. To hold otherwise would also imply criminal law-making powers of the Union which had not been recognised then. Given the absence of such authority at the time, EU law could not dictate the continued validity of implementing national legislation. Some authors explicitly tie the primacy of EU law to its legislative powers in the field of criminal law.[20] The application of *lex mitior* would, as a consequence, become a simple matter of national law even where it defied EU law obligations.

However, after the entry into force of the Lisbon Treaty, this position is moot for the most part. The argument that EU directives cannot command that the older (implementing) criminal legislation persist (for lack of legislative competence) has lost its legal backbone. Furthermore, this line of thought overlooks that there actually was a collision, namely between the national implementing legislation (to the extent that it had to be interpreted as an expression of the principles of loyalty and effectiveness) and the newly introduced criminal provisions (or, alternatively, the *lex mitior* clause of the Italian Criminal Code). One is left to wonder whether deeper cleavages with respect to the scope and concept of primacy are lurking at this point. A later section will address this aspect. At this stage, it suffices to note that, up to now, the *Scheinkollision* remains a commonly shared position among criminal lawyers.

Other voices, critiquing the CJEU's ruling, have focussed on the *lex mitior* safeguard and present it as a main outcome of the case.[21] However, the bad faith of the legislature in the cases at issue gave them reason to pause. In a rather pragmatic, though creative fashion possible exceptions to the general rule were pondered. From this perspective, the key question that presented itself in *Berlusconi* was whether and to what extent *lex mitior* constrains primacy.[22] Klip argues that legislative changes initiated by the party of an accused should be treated as void of any legal effect vis-à-vis EU law and implementing domestic criminal provisions. This proposition is based on an analogy to Article 7, paragraph 2 of the European Convention on Human Rights (ECHR), which is arguably not regulating a

[18] B Hecker, *Europäisches Strafrecht*, 5th edn (Heidelberg, Springer Verlag, 2015) § 9 no 15 ff; in the same vein G Dannecker and J Bülte, 'Die Bedeutung des Unions- und Gemeinschaftsrechts für das nationale Wirtschaftsstrafrecht' in H-B Wabnitz and Th Janovsky (eds), *Handbuch Wirtschafts- und Steuerstrafrecht*, 4th edn (Munich, CH Beck, 2014) no 251, 254; Satzger (n 17) 998, 1000.

[19] Hecker, *ibid*, § 9 no 15 ff.

[20] Dannecker (n 17) 313.

[21] Biondi and Mastroianni (n 16) 553; A Klip, *Substantive Criminal Law of the European Union*, 3rd edn (Antwerpen, Maklu, 2016) 203.

[22] Biondi and Mastroianni (n 16) 553.

sufficiently similar situation, however. Article 17, paragraph 1 of the Rome Statute ('unwillingness' to prosecute crimes within the jurisdiction of the International Criminal Court) could *prima vista* be a better fit. In any case, the remaining uncertainties testify to the fact that neither the foundation nor the permissible restrictions of *lex mitior* are well-articulated in EU law.

Overall, the discussion has done very little to advance our understanding about legality, *lex mitior* and the legal effects of directives in criminal law. *Berlusconi* is remembered for being an important addition to the *Kolpinghuis* jurisprudence which, however, sits uncomfortably with the factual background of the case and other rulings of the CJEU in comparable cases. Yet, much more could have been learned from the *Berlusconi* case. It is time to revisit this landmark case to tap into its full potential.

V. Perspectives on *Berlusconi*

The case can be approached from three different perspectives: *lex mitior*, primacy and effects of criminal law directives. The CJEU presents its solution as a clear-cut case that does not warrant resolving the tensions between primacy and *lex mitior* or clarifying the relationship between direct effect and primacy. Supposedly, the *Kolpinghuis* doctrine had done the entire job already. AG Kokott presented an entirely different view, according to which *Kolpinghuis* did not apply and *lex mitior* had to yield in light of the bad faith of the authors of the new laws.[23] Who is right hinges on two theoretical questions. First, what type of EU law does primacy presuppose? Second, at what moment does the impact of primacy start to unfold? Notwithstanding these highly intricate theoretical matters, what appears to be missing the most is an integrated solution under the umbrella of the legality principle (understood as a fundamental principle of EU law). However, one should not blame the CJEU for offering no clear vision of legality as a fundamental principle of EU criminal justice in *Berlusconi*. The judgment predates the recognition of the Union's criminal law competences, the emergence of the Union's goal of establishing an area of freedom, security and justice, as well as the entry into force of the CFR. But this does not absolve us from understanding legality as a multilevel concept that integrates multiple legal actors and layers of legal sources today. This section therefore seeks to answer both preliminary questions and to bring these findings in line with the *lex mitior* concept within the framework of the legality principle.

[23] AG Kokott, *Berlusconi et al* (n 1), Opinion delivered on 14 October 2004; A Biondi and R Mastroianni (n 15) 553, 561, 562, agree that Berlusconi is distinguishable from Kolpinghuis and presented no problem of direct effect of a directive.

A. The Concept of Primacy

The case raises the question whether directives enjoy primacy or, in more abstract terms, whether direct effect is a precondition of primacy. The relationship between primacy and direct effect is indeed not beyond controversy.[24] It has been suggested that immediate direct effect is a condition precedent for EU law to have primacy ('trigger model').[25] Primacy would then characteristically operate through a substitutionary effect. For EU law to claim primacy it would therefore, at least, have to produce independent effects within national legal systems (that could replace national law-based legal effects and allow parties to invoke EU law before national courts).[26]

The dominant strand in the field appears to follow a more flexible line ('primacy model').[27] In this model supremacy is conceived of in a conceptually broader sense, as a constitutional function of EU law rather than just a mechanism to resolve individual disputes between inconsistent provisions. Enforcement of directly applicable norms is not the real concern behind primacy, but effectiveness and consistency (of the application of common-market provisions in this particular case) is.[28] To this end the principle of primacy produces certain legal (exclusionary) effects whenever an incompatibility between a rule of EU law and a rule of domestic law appears, irrespective of the former's direct effect or self-executing specificity. The EU rule may take the place of the yielding national rule (substitution) but this is not a mandatory requirement. An exclusionary effect, nonetheless, presupposes that EU law has a specific, identifiable and binding legal impact. Such legal effects could (among others) emanate from the interplay of EU-induced national norms and EU enforcement principles or directives,[29] provided they put forward an identifiable legal result which must not be thwarted by incompatible national measures. The primacy effect would be limited to the extent of the actual conflict with domestic rules in this model.

Primacy therefore would, after all, not presuppose directly applicable EU norms. Rather, direct effect should be seen as an alternative form of invoking EU law

[24] P Craig and G De Búrca, *EU Law, Text, Cases and Materials*, 6th edn (Oxford, Oxford University Press, 2015) 276; K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 (3) *EL Rev* 287, 290–91, 303.

[25] M Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct and Supremacy' [2007] *Common Market Law Review* 931, 932.

[26] See *ibid*, 931, 932 ff; also for *Berlusconi* B Wegener and T Lock, 'Die Kleinen "hängt" man, die Großen lässt man laufen? Berlusconi und Niselli – Ungleiche vor dem EuGH' (2005) 6 *Europarecht* 802, 807.

[27] Craig and De Búrca (n 24) 277; Lenaerts and Corthaut (n 24) 287, 289–91.

[28] Lenaerts and Corthaut (n 24) 287, 290.

[29] Lenaerts and Corthaut (n 24) 287, 290–91, 303; see Case C-285/98 *Tanja Kreil* [2000] ECR I-00069, where Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40 precluded the application of national provisions. The CJEU expresses the same understanding in *Berlusconi et al* (n 1) para 72.

which becomes necessary where exclusion is not enough and empowerment and private enforcement are needed. Even if one would argue with the trigger model that primacy *stricto sensu* requires two potentially applicable, yet irreconcilable norms to exist, the principle of effectiveness would cause the same result.[30] The *Scheinkollision* solution is, thus, at odds with the prevailing opinion in EU law. Although it conflates arguments on direct effect and primacy[31] it can (unwittingly?) be understood as an expression of the trigger theory. If a direct collision would require a directly applicable conflicting EU norm, claiming primacy would inevitably presume attributing direct effect to a directive. While this view cannot be dismissed as indefensible it needs to be emphasised, however, that the special characteristics of (EU) criminal law do not lend it further support either. As we have seen above it is not in conflict with the EU's allocation of law-making competences (anymore). Moreover, directives (in conjunction with EU enforcement principles and) in combination with national transposition measures may very well produce independent legal effects that directly expand or limit individual freedoms. This does not turn the directive into a direct source of criminal liability though. The second main theoretical question in the *Berlusconi* case was rather whether the national object of interpretation (and effective enforcement) was still valid when the question of primacy arose.

To conclude, not only directly applicable EU rules may enjoy primacy, even in criminal law.[32] The recent *Taricco* judgment is a case in point. In this case, the requirement of effective implementation of EU tax law justified the refusal to apply pre-existing statutes of limitation. There is no apparent doctrinal difference between newly introduced legislation and pre-existing law; also, it does not make a difference in terms of legal effects and the concept of primacy whether substantive or procedural provisions are affected. Under the given circumstances of the case at hand it could be argued anyway that it would have been sufficient to disapply the procedural *lex mitior* rule in the Italian Code of Criminal Procedure instead of the new substantive provisions. This brings us to the central issue of the case: the intricate and unresolved relationship between primacy and *lex mitior*. Since the CFR became effective, the Italian procedural rule must be interpreted as (partly) embodying a fundamental right of the Union, namely Article 49, paragraph 1, clause 3 of the CFR. As such it may channel and curtail the enforcement of EU law. Admittedly, the application of the *lex mitior* safeguard logically presupposes that a *lex mitior* exists.

[30] See Case C-105/14 *Taricco* [2015] ECLI:EU:C2015:555; see in this sense Biondi and Mastroianni (n 16) 553, 564 ff, who suggest that the principle of loyalty be applied. This could, of course, lead to the next academic debate, ie whether the principle of effectiveness triggers supremacy, is a means to enforce supremacy, or produces comparable results independent of the principle of supremacy.

[31] eg H Satzger, *Internationales und Europäisches Strafrecht*, 7th edn (Baden-Baden, Nomos, 2016) § 9 no 88.

[32] Also Biondi and Mastroianni (n 16) 553, 569.

B. The Temporal Dimension of Primacy

The specific facts of the *Berlusconi* case call for a deeper reflection of the onset of the primacy effect. From a theoretical standpoint primacy could kick in automatically once a conflict between EU and national law arises or later upon determination of a competent authority. Hence, the impact of a national court decision to leave certain provisions unapplied by reason of their incompatibility with EU law, could be constitutive or declaratory. Only in the former case would the *Kolpinghuis* doctrine apply; since it would indirectly result in the inapplicability of the *lex mitior* rule. This presupposes, however, that *lex mitior* actually had the effect of commanding the application of the new provisions. This contribution will turn to the question of whether *lex mitior* really would have led to this result in the subsequent section.

In the latter case the new provision would have never become applicable to prior wrongdoing. That said, it would not have been necessary to rely on the directives directly to reanimate the former provisions. The CJEU's precedents imply that primacy sets in immediately once a conflicting national law or decision is passed and renders that measure inapplicable.[33] This interpretation finds additional support in the telos behind this development.[34] The CJEU has continuously fostered a dynamisation of the application of EU law. And, last but not least, it corresponds with the theoretical justification of supremacy which, from the standpoint of EU law, is an effect inherent in the respective EU norm.[35]

It could be argued, however, that indirect conflicts[36] call for a differential treatment since they depend on legal determinations to a considerably greater extent than other manifestations of primacy. To the knowledge of the author, such proposition does not find any support in the jurisprudence of the Court. It emerges from the case law (including criminal cases) that decisions of the referring court would merely confirm the inapplicability of conflicting rules or practices. Hence, referring to the enforcement obligations flowing from the directive would not be tantamount to having a direct incriminating or exacerbating effect.

[33] Case 11/70 *Internationale Handelsgesellschaft GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 01125, para 3; Case C-399/11 *Melloni* [2013] ECLI:EU:2013:107, paras 59 ff; Case C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 and others* [1998] ECR I-06307, para 21; Case C-8/88 *Deutschland v Kommission* [1990] ECR I-2321: Primacy is to be respected by any authority charged with applying EU law. This duty includes both courts and administrative agencies; Case C-13/91 and C-113/91 *Debus* [1992] ECR I-03617; M Ruffert, 'Art 1 AEUV' no 22 in Ch Calliess and M Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta,* 5th edn (Munich, CH Beck, 2016); M Nettesheim, 'Art 288 AEUV' no 52 in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union*, 60th supplement (Munich, CH Beck, 2016).

[34] See for instance Nettesheim, *ibid*, 'Art 288 AEUV' no 49.

[35] Nettesheim (n 33) 'Art 288 AEUV' no 51.

[36] German literature on EU law distinguishes between direct and indirect collisions, see Ruffert (n 33) 'Art 1 AEUV' no 22. With respect to primacy they are generally being treated the same. They block any introduction, interpretation or application of domestic law that challenge the validity or effectiveness of EU law.

Since, after all, the primacy effect logically sets in one ominous (legal) second (*juristische Sekunde*) earlier than *lex mitior*, one could be tempted to argue that the matter is settled for good in this fashion. And it is, indeed, recognised that primacy also takes precedence over the *lex posterior* rule.[37] This view, nevertheless, seems objectionable for it dodges the key problem of the case: the relation of primacy and effectiveness on the one hand and *lex mitior* on the other.[38] Article 51 CFR makes it clear that the application of EU enforcement principles needs to comply with fundamental principles. It continues to be an open question that needs to be satisfactorily answered whether *lex mitior* constrains the primacy effect of EU law. The outcome has potentially far-reaching consequences in light of the dynamic legal development in the EU and the growing awareness for effective enforcement. It must be clarified how far a national legislator is empowered to rearrange implementing legislation to which directives apply or whether EU law firmly stands in its way.

C. The Legality Principle in the CFR

The legality principle is a general principle of Union law and explicitly guaranteed by Article 49 CFR.[39] Modelled on Article 7 ECHR, this safeguard comprises the classic elements of legality, namely: *lex scripta*; *lex stricta*; *lex certa*; and *lex praevia*. Going beyond the text of the ECHR, Article 49, paragraph 1, clause 3 also contains a *lex mitior* rule. Although it explicitly refers to subsequent introductions of 'a lighter penalty', it is widely recognised that paragraph 1, clause 3 encompasses any change in the scope of liability or punishment to the benefit of a defendant.[40] The CJEU refers to this guarantee as the 'principle of retroactivity of the more lenient criminal law'.[41] While the European Court of Human Rights (ECtHR) has, nonetheless, interpreted Article 7 ECHR as to include a *lex mitior* rule, their legality concepts diverge in an important (not yet fully appreciated) aspect. In EU law legality must be understood as a multilevel concept.[42] Preserving legality is a shared responsibility. This insight has a number of considerable consequences.

[37] Nettesheim (n 33) 'Art 288 AEUV' no 52.

[38] Under the CFR, legality is supposed to act as a limit to direct effect, V Mitsilegas, 'Art 49' no 22 in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights* (Baden-Baden and Oxford, CH. Beck, Hart Publishing and Nomos, 2014).

[39] *Ibid* 'Art 49' no 19; A Eser, 'Art 49' no 9 ff in J Meyer (ed), *Charta der Grundrechte der Europäischen Union*, 4th edn (Baden-Baden, Nomos, 2014); Herlin-Karnell (n 16) 20; K Karsai, 'The Legality of Criminal Law and the New Competences of the TFEU' [2016] *Zeitschrift für internationale Strafrechtsdogmatik* 24, 35.

[40] Eser, *ibid* 'Art 49' no 34; Case C-218/15 *Paoletti and Others* [2016] ECLI:EU:C:2016:748, para 27.

[41] *Paoletti*, *ibid*, paras 25 and 27.

[42] Instructive Ch Peristeridou, *The Principle of Legality in European Criminal Law* (Cambridge, Intersentia, 2015) 295 ff.

i. Legality as a Multilevel Concept

As a multilevel concept, legality first of all protects the system of shared competences in the area of freedom, security and justice.[43] Legality requires that the EU and national bodies stay within the confines of their respective law-making powers. In this sense and in stark contrast with the ECHR, EU legality serves democratic self-determination. It guarantees that decisions are taken at the right political level and by those organs that have been designated as responsible democratic actors in the EU treaties. Otherwise, legislative acts would lack democratic legitimacy.

Furthermore, legality allocates the (shared) responsibility to ensure throughout the law-making process that a new criminal provision is sufficiently foreseeable and accessible. A similarly shared responsibility exists with a view to the implementation of EU law. This insight is particularly important in areas of indirect enforcement such as criminal law. The EU treaties, with the exception of Article 325 of the Treaty on the Functioning of the European Union (TFEU), do not provide for criminal legislation by regulation. Union level and national level are to guarantee legal certainty in an integrated two-step process that combines EU directives and national implementation. The EU directive must be sufficiently clear and specific to allow a coherent and foreseeable implementation. For their part, national law-makers and courts are then to further substantiate and specify the content throughout the implementation process in order to reach the compulsory level of legal certainty.

Finally, EU legality comprises a *lex mitior* rule. Its codification in the CFR has confirmed its status as a special constitutional safeguard. However, no details are elaborated on in Article 49 CFR.[44] And there is little, if any, guidance from the CJEU. The Court does not say anything substantial about the justification and content of *lex mitior* in the *Berlusconi* case. It merely postulates its normative provenance from the common constitutional tradition of the Member States.[45] More has been said about origin and scope of the doctrine advocated by AG Kokott. She understands *lex mitior* as an exception to the principle of legality (legal certainty) that is ultimately 'based on considerations of fairness'.[46]

The characterisation of *lex mitior* as an exception to the legality principle does not hold up as the following section will show. *Lex mitior* must be conceived of and explained as an expression of legality. In this regard, the concept of *lex mitior* has remained obscure after *Berlusconi*. In the meantime, the ECtHR has recognised an unwritten *lex mitior* rule in Article 7 ECHR. To illuminate the meaning of *lex mitior*, one may therefore draw on the ECtHR's explorations in several recent decisions.

[43] *Ibid* 296, 297.
[44] Karsai (n 39) 24, 35.
[45] *Berlusconi et al* (n 1) para 68.
[46] AG Kokott, *Berlusconi et al* (n 1), opinion delivered on 14 October 2004, para 160.

ii. The Meaning of Lex Mitior

Unlike Article 15 of the International Covenant on Civil and Political Rights (ICCPR), the ECHR did not know a *lex mitior* safeguard until after the *Scopolla (No 2)* judgment of the ECtHR. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty or otherwise changes to the benefit of the offender, that new penalty or provision shall be applicable.[47] Either the constituent elements of the crime offence or the regulations in civil or administrative law (stipulating what conduct is prohibited) which they reference must have undergone a change over time. *Lex mitior* does not encompass changes in the legal status of the perpetrator or in the actual circumstances, in which case the unaltered criminal provisions are to be applied.[48]

The retroactive application of a milder criminal provision is obviously compatible with the ban on retroactive introduction of criminal prohibitions or stiffer sentences. But why should an offender benefit from changes in the law after the material time? What is more, many jurisdictions know the category of *Zeitgesetz* (temporary law; frequently used in the areas of commercial or trade law), which from the outset limits the applicability of criminal provisions to a certain period of time with a view to their purpose and substance. It is uniformly accepted that *lex mitior* does not apply to these laws.[49] They are not affected by later changes in the law.

The ECtHR argues that it would be contradictory and unequitable to hold a perpetrator accountable to standards that had already been repealed or abolished at the time of judgment.[50] To deny retroactive application of more lenient provisions would result in treating the same kind of conduct differently just because of different times of commission. The Strasbourg Court adds that the application of the more recent laws is also a matter of foreseeability under Article 7 ECHR.[51] While the latter argument is not beyond any doubt, the former one deserves a closer look. It is not the later change in the scope and degree of criminal punishability as such that calls for its application to earlier cases. It is neither contradictory nor unjust to hold perpetrators accountable according to the standards that they (foreseeably) had to obey when they committed the crime. The equity argument gains substance only when the reasons behind the legislative changes are taken into account. If the legislature changed a criminal statute for reasons of constitutional law, humanity

[47] *Scoppola v Italy (No 2)* App no 10249/03 (ECtHR, 17 September 2009) para 108 f; *Maktouf and Damjanović v Bosnia Herzegovina* App no 2312/08 and 34179/08 (ECtHR, 18 July 2013); *Gouarré Patte v Andorra* App no 33427/10 (ECtHR, 12 January 2016) para 28; see also *Schmitt v France* App no 52118/99 (ECtHR, 19 June 2001).
[48] *Paoletti and Others* (n 40) para 33; *Rosanò*, 'Principle of lex mitior, Is that you? – Case note on C-218/15, Paoletti and others' (2017) 8 *New Journal of European Criminal Law* 6, 12.
[49] T Fischer, *Strafgesetzbuch mit Nebenbestimmungen*, 64th edn (Munich, CH Beck, 2017) § 2 no 13.
[50] *Scoppola v Italy (No 2)* (n 47) para 108; in the same vein Herlin-Karnell (n 16) 20; in *Paoletti and Others* (n 40) para 27, the CJEU apparently also views the change in the position of the legislature as the pivotal aspect.
[51] *Scoppola v Italy (No 2)* (n 46) para 108.

or in reaction to changes in societal attitudes and preferences, it would, indeed, be unfair to judge a case based on standards that the sovereign has ex post facto found to be no longer acceptable for one of the aforementioned reasons. Viewed from this perspective, *lex mitior* is a procedural transmission belt for the implementation of normative change. It is only this normative dimension that justifies considering the *lex mitior* rule as an act of justice and proportionality.[52]

Recent case law implies that the ECtHR does not insist on mechanical compliance with the rule but pays attention to the reasons behind legislative changes, in particular if they affect only shorter interim periods (for technical reasons).[53] Overall, it emerges that *lex mitior* primarily applies when the competent national bodies (sometimes dictated by their constitutional courts) have changed their penal attitudes in favour of more lenient sanctions or have decided to increase the requirements of criminal liability. As a consequence, *lex mitior* does not establish a most-favoured-treatment clause. It knows certain implicit limits flowing from its normative foundations. Hence, the interests and reasons behind each change in the law need to be verified before *lex mitior* is applied.

VI. Reassessing Key Elements of *Berlusconi* in the Light of Multilevel Legality

In the final section the impact of such an updated understanding of legality on the contentious aspects of the *Berlusconi* case shall be tested, most importantly the relationship between primacy and *lex mitior*. However, whether the direct effect of directives would be compatible with or excluded by legality also deserves a second look.

A. Direct Effect

The rule that directives cannot be directly relied upon in order to determine or aggravate liability in criminal law is widely accepted. It is much less clear whether this limitation flows from the essential nature of the directive[54] or whether it is dictated by the legality principle. In terms of classical legality, a criminal provision

[52] Dannecker (n 17) 309, 315: 'Ausprägung verhältnismäßiger Gerechtigkeit'; see G Radbruch and E Wolf, *Rechtsphilosophie* (Stuttgart, Koehler, 1956) 123. G Dannecker, *Das intertemporale Strafrecht* (Tübingen, JCB Mohr, 1993) 410 ff; F-Ch Schroeder, 'Der zeitliche Geltungsbereich der Strafgesetze' in P Bockelmann and A Kaufmann (eds), *Festschrift für Bockelmann zum 70. Geburtstag 1978* (Munich, CH Beck, 1979); K Tiedemann, 'Zeitliche Grenzen des Strafrechts' in J Baumann and K Tiedemann (eds), *Einheit und Vielfalt des Strafrechts: Festschrift für Karl Peters zum 70. Geburtstag* (Tübingen, Mohr Siebeck, 1974).

[53] *Ruban v Ukraine* App no 8927/11 (ECtHR, 12 July 2016).

[54] Mitsilegas (n 38) 'Art 49' no 22.

must be sufficiently accessible and foreseeable. According self-executing direct effect to a criminal law directive would not be incompatible with this principle as long as the directive's contents are sufficiently clear and predictable. In a case like *Berlusconi*, a different assessment could be called for if the crime was committed after the entry into force of the new legislation. In these circumstances the scope of criminal liability might not be foreseeable in light of two potentially applicable sets of criminal law. The foreseeability is severely impaired by the fact that any potentially exclusionary effect does not extend beyond the scope of the conflict which, for its part, is staked out by the requirements of effectiveness. It is barely possible, at least for ordinary citizens, to determine the extent to which the older legislation would remain in force.

Directives and their direct effect also appear to qualify as 'law' for the purposes of the legality test. Human rights law requires that criminal liability is stipulated 'by law' but interprets this criterion as a matter of national constitutional law and takes account of the characteristics of the domestic legal order. In this light direct effect of criminal law directives becomes a matter of the EU legal order whose treaties generally do not allow for the introduction of directly applicable criminal provisions. EU law recognises direct effect of directives only in so far as it does not give rise to obligations against individuals. However, the key argument underlying this pillar of EU doctrine is not legality-driven. Direct effect was derived as an empowerment tool meant to enhance private enforcement of EU law.[55] There is no equivalent to that particular rationale in the field of criminal law. Direct effect would equip the prosecutor with a new basis of authorisation rather than bestow a subjective right.

But one could argue from a functional perspective that it would serve the interests of the Union to enlist courts and prosecutors to enforce EU law vis-à-vis recalcitrant national governments and parliaments. In this sense prosecutions based on directives would become means of indirect enforcement. In a criminal law environment, a prosecutor would nevertheless still pursue public (supranational) interests and not subjective rights that national bodies are (illegally) trying to withhold. In such a situation, it is reasonable to hold Member States accountable for their failure to implement EU law; it is much less convincing to shift the burden of non-compliance of states to their citizens.

Finally, in a multilevel system approving direct effect of criminal law directives would run counter to the system of shared competences. Since implementation at the national level adds vitally to the democratic legitimacy of EU criminal law, direct effect of criminal directives is irreconcilable with the notion of self-determination. As a consequence, the *Kolpinghuis* doctrine may also be interpreted as an imperative of EU legality.

Nevertheless, in the case at hand, direct effect was not the central issue. As was explained above, it was the indirect effect of various directives that would have

[55] Ruffert (n 33) 'Art 1 AEUV' no 29.

justified maintaining the applicability of national implementing legislation in the face of later legislative incursions. It needs to be analysed now whether such an outcome can be reconciled with the principle of legality.

B. *Lex Mitior*

In a supranational, multilevel context the concept of *lex mitior* needs to be adjusted to these constitutional structures. This transformation is particularly important with respect to the future application of EU law. While *lex mitior* has been incorporated in Article 49, paragraph 1 of the CFR, there are clear signs at the EU level that stronger enforcement should be expected.[56] It is only a question of time until courts will need to reconsider what limits the principle of legality sets on the enforcement of EU law. So far it remains an open question whether *lex mitior* applies when it contradicts Union law.[57]

In the words of AG Kokott:

> the retroactive application of a more lenient criminal provision is justified only where the primacy of Community law is preserved, that is to say, where the value judgements of the Community legislature are also taken into account and the (revised) opinion of the national legislature is in conformity with the provisions laid down by the Community legislature.[58] I do not see why the defendant should retroactively benefit from the national legislature's revised assessment of the punishability of his conduct where that assessment runs counter to the unchanged provisions of Community law.

Of course, her reasoning was based on the assumption that *lex mitior* is a concept of fairness, not of legality, and as such 'cannot have the same high status'.[59] From this point of view, there is, of course, no reason to make an exception to a fundamental constitutional principle such as legality based on considerations of fairness when a national legislature infringes the provisions of Union law.[60] On the contrary, it jeopardises both the uniform application of Union law and the coherence of national legal systems.

But despite the mischaracterisation of *lex mitior*, AG Kokott has a point. The introduction of the new legislation was not based on considerations of justice or humanity but a blunt attempt to hamstring the bringing to justice of a powerful politician. It had been adopted in clear violation of binding EU law for the

[56] *cp Taricco* (n 30).

[57] See HD Jarass, 'Art 49', no 15, *Charta der Grundrechte der EU*, 3rd edn (Munich, CH Beck, 2016); Biondi and Mastroianni (n 16) 553, 562–63, exclude its application when the lex *mitior* is in conflict with EU law. In support of their position they refer to the *Tombelli* and *Niselli* decisions of the CJEU: Joined Cases C-304/94, C-330/94, C-342/94, C-224/94 *Tombesi* [1997] ECR I-03561, para 43; Case C-457/02 *Niselli* [2004] ECR I-10853, para 30.

[58] AG Kokott, *Berlusconi et al* (n 1), opinion delivered on 14 October 2004, para 162.

[59] AG Kokott, *Berlusconi et al* (n 1), opinion delivered on 14 October 2004, para 160: It does not serve the rule of law.

[60] AG Kokott, *Berlusconi et al* (n 1), opinion delivered on 14 October 2004, para 163.

purpose of shielding the person concerned from criminal responsibility. Referring to the implicit limitations of *lex mitior* explained above it could be argued that it is reasonable not to apply it in this case since the applicants could not rely on any of the normative reasons underlying the concept.

But even assuming that Italian law-makers were truly motivated by concerns over the harshness of the earlier implementation, it would have remained a contentious question how to resolve the divide between national and European attitudes. From the standpoint of EU law the answer seems clear. EU law prevails as long as national legislation is incompatible with Union law. The legality principle does not command a diverging conclusion. Understood as a multilevel concept, it underscores that the Union view takes precedence over the national one (as long as it does not infringe on EU law, in particular the CFR, itself). The legality principle allocates authority to set policy goals and targets (of effectiveness) which are binding on other authorities further down the implementation stream. In this respect, it deserves mention that more lenient laws prevailed in several cases where the changes in the legal framework were in line with or required by Union law.[61] These examples highlight the multilevel dimension of the issue. The changes were brought about by the (according to primary EU law) competent supranational bodies and had to be followed even against differing perceptions at the national level.

To conclude, legality may limit primacy but only under the condition that it protects interests of proportionality and equity that are themselves grounded in or compatible with EU law. If, for instance, new domestic laws that repeal older implementation acts have properly satisfied EU requirements, the *lex mitior* rule must be observed in favour of the accused. Conflicts of assessment and interpretation are to be resolved through the mechanisms installed by the treaties. Where Member States are found liable of deliberate infringements of Union interests their legal actions must be disregarded for the determination of the *lex mitior*. This was the situation in *Berlusconi*. *Lex mitior*, therefore, had not forced national courts to afford the defendants the legal benefits intended to be brought about with the legislative changes.

VII. Conclusions

The *Berlusconi* judgment has left many crucial questions unanswered. The CJEU has done very little to clarify either the effects of directives or the notion of *lex mitior*. This contribution has sought to expose the many weaknesses and

[61] Case C-341/94 *Allain* [1996] ECR I-04631; Case C-230/97 *Awoyemi* [1998] ECR I-06781: crime inconsistent with directive before the end of the implementation period; Case C-193/94 *Skanavi* [1996] ECR I00929, paras 16, 17: more favourable criminal law takes retroactive effect to the extent to which it is contrary to the provisions of the Treaty (Eastern European workers without valid work permit may not be punished for prior illegal conduct after the date of accession that legalises said conduct).

shortcomings hidden behind the façade of this landmark ruling. It has tried to achieve this objective by exposing the premises of the ruling and confronting it with an advanced interpretation of the principle of legality. To date the Court has shown no initiative to reformulate its understanding of legality to fit the present constitutional structure of the EU.

Against the background of the *Berlusconi* case, this contribution therefore set out to develop and promote a multilevel notion of legality that understands the interpretation and implementation of EU directives as an exercise of public EU authority bound by supranational fundamental rights. Discussing the main argumentative pillars of *Berlusconi* based on these insights it emerged that denying the direct effect of criminal law directives finds strong support in a multilevel legality principle. By contrast, the *lex mitior* rationale behind the judgment collapsed. The legality principle lends no support to this key aspect of the *Berlusconi* ruling. Its landmark status should be scrapped. These findings and propositions may not be uncontroversial but they are necessary to revive a debate that is long overdue.

Allusion, Illusion, Delusion. The Assessment of the Berlusconi *Judgment in Italy*

ALBERTO DI MARTINO

I. Ambiguities

Many Italian scholars, after having expressed harsh criticism[1] against the Opinion of the Advocate General in the case of *Berlusconi and Others*,[2] should have felt relieved by the judgment of the Court on the limits of European law's prevalence on domestic law whenever fundamental principles of criminal law are at stake.[3] Nonetheless, it has left the impression that a fundamental issue explicitly raised by the Advocate General has been avoided, as to whether the principle of retroactivity of the more lenient penalty (the so-called *lex mitior* principle, newly enshrined in Article 49 of the Charter of Fundamental Rights of the European Union (CFREU)) is applicable whenever it would lead to the application of domestic rules that are incompatible with Community (now European) law.

Apart from the result, the reasoning of the Court has appeared ambivalent, if not inconsistent indeed.

[1] See especially the essays contained in R Bin, G Brunelli, A Pugiotto and P Veronesi (eds), *Ai confni del 'favor rei': Il falso in bilancio davanti alle Corti Costituzionale e di Giustizia* (Milano, Giuffrè, 2004), and in particular the harsh criticisms raised by N Mazzacuva, 'A proposito di "interpretazione creativa" tra diritto penale, principi costituzionali e direttive comunitarie' (but see S Riondato, 'Falso in bilancio e Corte di Giustizia CE (causa Berlusconi). Non è un rigetto', *ibid*). Specifically after the Opinion of the Advocate General and before the European Court of Justice's (ECJ) judgment, see L Mezzetti, 'Il falso in bilancio fra Corte di Giustizia e Corte Costituzionale italiana (passando attraverso i principi supremi dell'ordinamento costituzionale)', www.giurcost.org/studi/mezzetti.html (labelling that Opinion as 'more a pladoyer of a public prosecutor than an Opinion of an Advocate General in front of the European Court of Justice'). On the topic of the impact of European obligations to criminalise certain types of behaviour on the safeguards set out by the Italian Constitution (criminalisation only through parliamentary law – '*riserva di legge*'), see generally G Insolera, *Democrazia ragione e prevaricazione* (Milano, Giuffrè, 2003), especially 59–64.

[2] Opinion of the Advocate General (AG) Kokott delivered on 14 October 2004 [2004] OJ I3568.

[3] 'To uphold the conclusions of the Advocate General would have been tantamount to abandon the *lex mitior* principle': A Rossi, 'Reati ed illeciti amministrativi societari' in F Antolisei (C F Grosso), *Manuale di diritto penale. Leggi complementari*, 13th edn (Milano, Giuffrè, 2007) Vol I, 174.